Supreme Court, U.S.
FILED

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021057 JAN 6 2003

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DON ROPER,
Superintendent,
Potosi Correctional Center,

Petitioner,

vs.

WILLIE SIMMONS,

Respondent.

On Petition for Writ of Certiorari to the United States of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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16 pp

CAPITAL CASE
QUESTION PRESENTED

Can a criminal defendant's trial counsel be held ineffective for making a strategic choice of the sort this Court called "virtually unchallengeable" in *Strickland*, in selecting the theme of a penalty phase defense, when the court of appeals disagrees not with the adequacy of the underlying investigation, but with the wisdom of counsel's choice?

PARTIES TO THE PROCEEDING

Petitioner, Don Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent, Willie Simmons, is confined. Superintendent Al Luebbers, Roper's predecessor, was the respondent in a habeas corpus action in the district court and the appellee in the Court of Appeals.

Respondent Simmons is a prisoner in state custody. He was the petitioner in a habeas corpus action in the district court and the appellant in the court below.

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I. The decision of the court below that a reviewing court may find penalty phase counsel ineffective for his choice of a penalty phase strategy, absent a deficient investigation or lack of legal or factual knowledge is contrary to the decisions of this Court and the decisions of other United States Circuit Court of Appeals that have followed the teaching of this Court. The conflict involves an issue crucial to the administration of criminal justice in that trial counsel must be free to use their best properly informed judgment in choosing penalty phase strategy. If counsel cannot, the trust between attorney and client, the ability of attorneys to rely on informed professional judgment and even the willingness of attorneys to accept capital cases will be impaired.

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinion of U.S. Court of Appeals for the Eighth Circuit, by Heaney J., published as *Simmons v. Luebbers*, 299 F.3d 929 (8th Cir. 2002), is reproduced in the Appendix ("App.") at A6-A30. The unpublished opinion of the U.S. District Court for the Eastern District of Missouri is reproduced at App. A40-A149. The opinion of the Missouri Supreme Court is published as *Missouri v. Simmons*, 955 S.W. 2d 729 (Mo.1997) and is reproduced at App.A152-A195

JURISDICTION

The Court of Appeals entered its judgment on August 4, 2002, and denied rehearing on October 8, 2002. This

Court has jurisdiction under 28 U.S.C. Section1254(1) The court below had jurisidiction under 28 U.S.C. Section 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States Amendment VI: "In all criminal prosecutions the accused shall enjoy the right to . . . . have the assistance for counsel for his defense."

Constitution of the United States Amendment XIV Section 1: ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ."

28 U.S.C. Section 2254(d)(1):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law; as determined by the Supreme Court of the United States;

STATEMENT OF THE CASE

Willie Simmons, in separate incidents, murdered Leonara McLendon and Cheri Johnson.

Initially, Simmons was tried jointly for the murders. He was convicted of each and sentenced to death for each (App.A 152). The Missouri Supreme Court overturned the convictions, finding state law error because the trial court did not sever the cases for separate trial (App.A152-A153).

Simmons was again convicted and sentenced to death for each murder after separate trials, and these convictions and sentences were affirmed by the Supreme Court of Missouri (App.A29-A30). The United States Court of Appeals for the Eighth Circuit overturned both death sentences through writs of habeas corpus (App.A29-A30).

The court below found no deficiency in the investigation by penalty phase counsel into Simmons's troubled childhood and family background. (App.A13-A23,A25-A26) The court even agreed that it could be considered reasonable strategy not to bring in this information through the report of a defense mental health expert, as the conclusion of the expert confirmed the State's argument that Simmons is a violent sexual predator (App.A17).

The Missouri Supreme Court had found that calling family members to testify about Simmons's background would have brought negative as well as positive information about Simmons before the jury and would have highlighted the contrast with his brother who was raised in the same home and became a successful physician. (App. A192) . TheMissouri Supreme Court and the court below both recognized the competing considerations in deciding whether to introduce this evidence in the penalty phase at all.

The court below nonetheless held that Simmons's penalty phase counsel was ineffective for deciding not to bring in this evidence. In the court's view, keeping Simmons's boyhood transgressions from the jury and avoiding comparisons with his successful physician brother were

inadequate reasons to justify relying on a plea for mercy from Simmons's mother. (App.A21-A22). The court below found that in light of the strong aggravating evidence, counsel should have known that his strategic choice to assert a defense based solely on a plea for mercy would fail. (App.A20-A21). According to the Eighth Circuit, "some strategy decisions are so unreasonable that they can support a claim of ineffective assistance of counsel" , the selection of a strategy relying on a plea for mercy was such an unreasonable strategic choice. (App.A20).

REASONS FOR GRANTING THE WRIT

The decision of the court below, that a reviewing court may find penalty phase counsel ineffective for his choice of penalty phase strategy absent a deficient investigation or lack of factual or legal knowledge, is contrary to the decisions of this court and the decisions of United States Circuit Courts of Appeals that follow the teaching of this Court. The conflict involves an issue crucial to the administration of criminal justice as counsel must be free to use their best, properly informed judgment in choosing penalty phase strategy. If counsel cannot, the trust between attorney and client, the ability of attorneys to rely on informed professional judgment and even the willingness of attorneys to accept capital cases will be impaired It is an issue that will not be resolved by – though it highlights the importance of – this Court's consideration of *Wiggins v. Corcoran*, a case that will further explore the requirements for an adequate investigation into evidence that might be presented to support a defendant's case for mitigation.

A. The Eighth Circuit's holding erases the line between investigation and trial strategy that this Court identified in *Strickland* – a line that has been followed consistently by other courts of appeals.

In *Strickland v. Washington*, 466 U.S. 668, 690 (1984), this Court was faced with an allegation that penalty phase counsel was ineffective for having his client take full responsibility for his actions and ask for mercy, rather than using character or psychological evidence in an attempt to deflect responsibility for the crime. This Court upheld counsel's decision, and in doing so, it differentiated between the work done by counsel to prepare for trial, and the strategic choices made by counsel at trial. Thus the Court endorsed *habeas* review of counsel's investigatory and research efforts, but opined that "strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable." *Id.* This Court's teaching in *Strickland* is that there are countless ways to provide effective

legal assistance in any particular case and relying on rigid definitions of effectiveness rather than informed judgment of counsel would dampen the ardor and the independence of trial attorneys, impair trust between attorneys and clients and discourage counsel from accepting criminal cases. *Id.* at 689-690.

This Court has repeatedly reaffirmed the distinction made in *Strickland.* It has consistently rejected challenges to the properly informed decisions of counsel to limit the type or quantity of penalty phase evidence. *See, e.g., Dardén v. Wainright*, 477 U.S. 168, 185-186 (1986) (upholding counsel's strategic choice to rely on a simple plea for mercy rather than presenting background or psychological evidence); *Burger v. Kemp*, 483 U.S. 776, 788-796 (1987) (upholding counsel's strategic choice to present no mitigating evidence despite available evidence of a troubled childhood and psychological problems); *Bell v. Cone*, 535 U.S. 685 (2002) (upholding strategic choice to present no mitigating evidence at all).

On the other side of the *Strickland* line, the Court has endorsed evaluation of the investigatory work done by defendants' counsel. In *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000), the Court found penalty phase counsel ineffective for failing to conduct an investigation that would have revealed extensive mitigating evidence.

The courts of appeals have followed the spirit and letter of the distinction in *Strickland*, recognizing that if the investigation or research was sufficient' counsel's strategic decisions about the theme of the penalty phase defense are "virtually unchallengeable." Among the many cases in which the courts of appeals followed that course are: *Deputy v. Taylor*, 19 F.3d 1485, 1494-1495 (3d Cir. 1994) (counsel not ineffective for making strategic decision to rely on client's recent religious conversion rather than using testimony from family members to emphasize his turbulent past); *Hunt v. Lee*, 291 F.3d 284, 292-295 (4th Cir. 2002) (upholding counsel's strategic decision to present no penalty phase evidence, instead

pleading for mercy on behalf of a defendant); *West v. Johnson*, 92 F.3d 1385, 1406-1410 (5th Cir. 1996) (upholding counsel's decision to present no mitigating evidence when he made a reasonable investigation and it was possible counsel had sound strategic reasons for the decision); *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001) (rejecting claim that defense counsel was ineffective for not presenting evidence of Post-Traumatic Stress Disorder as mitigation and noting that the Sixth Circuit Court of Appeals had only found ineffectiveness in cases in which counsel totally failed to investigate mitigating evidence); *Hayes v. Woodford*, 301 F.3d 1054 (9th Cir. 2002) (counsel was not ineffective for making brief penalty phase presentation aimed at showing the defendant would flourish in a structured prison environment rather than going into his background as mitigation); and *Marek v. Singletary*, 62 F.3d 1298-1300 (11th Cir. 1995) (upholding defense counsel in deciding not to use mitigating evidence that would have attempted to explain a murder in terms of a defendant's childhood).

The decision of the Eighth Circuit here is unique – the first to erase the line between investigation and trial strategy in the choice of the theme of a penalty phase defense. The common thread linking *Strickland* and each of the decisions by the other circuit courts of appeals is respect for the properly informed strategic decision of counsel to limit the presentation of mitigating evidence at the penalty phase of a capital trial. This Court taught in *Strickland* that it is not the province of the federal courts to second-guess a properly informed professional judgment about the type of strategy to be used in a penalty phase defense. Unless the Court grants this petition, trial counsel in just the seven Eighth Circuit states will be subject to having a federal judge replacecounsel's wisdom with the judges' own. That incongruity merits this Court's attention.

B. Permitting federal judges to replace counsel's strategic trial decisions with adversely affects the administration of justice by reducing the automony of defendants' counsel.

This Court's decision in *Strickland* was premised on the understanding that the autonomy of counsel to make properly informed strategic choices is necessary to the criminal justice system. The decision of the court below specifically confines that autonomy. Counsel must now bear in mind that any strategic trial decision to limit the type or quantity of mitigating evidence presented at the penalty phase of a capital trial may be labeled ineffective assistance of counsel even if it is thoroughly investigated and properly informed. And that may not be the limit of the new rule. Having erased the distinction in *Strickland* between investigation and strategy, the Eighth Circuit opens the door to having federal judges supervise, *post hoc*, all aspects of trial strategy.

As specifically applied here, the Eighth Circuit has created a world in which capital defense counsel must present everything known to them in mitigation. Otherwise, they are inviting findings of ineffectiveness – even if presenting some or most of the evidence they discovered is against their best judgment or the wishes of their clients. Such a situation cannot help but affect the relationship between attorneys and clients and the willingness of attorneys to take criminal cases, especially capital cases, in which they may be faced with the dilemma of using a defense strategy that is contrary to their own best judgment, or risking being labeled ineffective by an appellate court that in hindsight disagrees with a strategy that proved unsuccessful. Such a situation cannot help but adversely affect the administration of justice – a result that this Court should not permit without consideration of its interaction with the 18-year-old rule in *Strickland*.

In short, the court below has again created for penalty phase defense counsel the same destructive dilemma this Court removed by its opinion in *Strickland*. The court below should

not be allowed to undo *Strickland* and it progeny without review of its decision.

C. The question posed here will not be resolved by answering the question on which this Court granted the petition in *Wiggins*.

This court recently granted a petition for writ of certiorari in *Wiggins v. Corcoran*, No. 02-311, on the following question:

> Does defense counsel in a capital case violate the requirements of *Strickland* . . . by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows the rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

As shown by the question presented, *Wiggins* fits firmly on the "investigation" side of the *Strickland* line. Like *Taylor*, it will require this Court to further explore just what constitutes a "thorough investigation of the law and facts relevant to plausible options." 466 U.S. at 690. Thus Wiggins insisted, in his argument in support of certiorari, that the Fourth Circuit had departed from precedent in two respects. First, it had "rejected the principle that 'in a capital case the attorney's duty to *investigate* all possible lines of defense is strictly observed.'" Petition for Writ of Certiorari, *Wiggins v. Corcoran*, No. 02-311 ("Wiggins petition"), at 23 (emphasis added), quoting *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999). Second, its approach "conflicts with prevailing standards in other Circuits for determining when counsel has undertaken sufficient *investigation* to justify deferring to counsel's trial tactics." Wiggins Petition at 26 (emphasis added).

Restricted as it is to the investigation stage, *Wiggins* does not raise the question presented here – *i.e.*, the ability of the federal courts to revisit counsel's choice, after a "thorough investigation of the law and [relevant] facts," from among the "plausible options." *Strickland*, 466 U.S. at 690. The conflict between the Eighth Circuit's decision here and the line of cases that follow *Strickland's* investigation/trial strategy distinction will remain. Thus the decision to grant the petition in *Wiggins* should not prevent the Court from taking up this closely related but distinct issue.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.